

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM SHIVERS,

Plaintiff-Appellant,

v

MCMARTIN, WASEK AND ASSOCIATES,
INC.,

Defendant-Appellee.

UNPUBLISHED

August 16, 2005

No. 251569

Genesee Circuit Court

LC No. 02-074652-CK

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(8). We affirm.

Plaintiff's first argues that the trial court erred in granting summary disposition with respect to Count I of the complaint. We disagree.

A trial court's ruling with regard to a motion for summary disposition is reviewed de novo. *Taxpayers of Michigan Against Casinos v State of Michigan*, 471 Mich 306, 317; 685 NW2d 221 (2004). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim[.]" *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). "Granting a motion pursuant to MCR 2.116(C)(8) is proper when the opposing party has failed to state a claim on which relief can be granted, the claim is clearly unenforceable as a matter of law, and no factual development could support recovery. When reviewing such a motion, only the pleadings are considered; no documentary evidence may be examined." *Id.* Factual allegations in support of the claim are accepted as true and construed in the light most favorable to the nonmoving party. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). However, mere "[c]onclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v Pioneer State Mutual Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

Count I of plaintiff's amended complaint alleged that defendant violated its duties to the insured to fairly and honestly service and adjust their property loss claims. Plaintiff asserted that defendant breached its duties by way of the following:

- a. Misrepresentation of the terms and conditions of property insurance contracts by advising the insureds the market value was the actual cash value within the meaning of the insurance policy.
- b. Making payment to the insureds based on market value rather than the co-insurance formula as set forth in the insurance policies.
- c. Misrepresenting the applicable Michigan Public Acts covering file loss monies to be disbursed to the municipal governments and the amounts forwarded to such governmental units.
- d. Misrepresenting that repairs or demolition must be completed in order to recover the repair or demolition costs up to the maximum amount of coverage where the loss exceeds the amount of coverage contrary to the Michigan Public Acts in such case so made and provided.
- e. Whether Defendant's conduct is subject to liability under common law principles of fraud/negligent misrepresentation.

Count I of plaintiff's amended complaint also asserted that defendant actively concealed material facts and misled consumers into believing that they were receiving the actual benefits afforded by their policies. Plaintiff asserted that "consumers relied on the representations of the defendant to their damages." Although plaintiff's amended complaint does not identify the precise legal theory underlying Count I, both parties described the claim as sounding in fraud/misrepresentation.

To establish a claim of fraudulent misrepresentation, a plaintiff must show that:

- (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Bergen v Baker*, 264 Mich App 376; 691 NW2d 770 (2004) (internal citations and quotations omitted).]

In addition to being based on false assertions, fraud may also be committed by suppression of facts and suppression of the truth. *Hord v Environmental Research Institute of Michigan*, 463 Mich 399, 412; 617 NW2d 543 (2000).

To the extent that plaintiff's amended complaint presents a fraudulent misrepresentation or silent fraud theory, whether defendant owed plaintiff a duty to adjust his claim fairly and honestly – as argued by plaintiff – is irrelevant, because duty is not one of the elements of fraudulent misrepresentation. See *Mable Cleary Trust*, *supra* at 499-500. At any rate, plaintiff failed to state a claim for fraudulent misrepresentation or silent fraud. Indeed, although plaintiff asserted that "consumers relied on the representations of the defendant to their damages," he did not support this assertion with any factual allegations of reliance or damages. Mere conclusory

statements, unsupported by factual allegations, are insufficient to state a cause of action. *Churella, supra* at 272.

Additionally, even when viewed in the light most favorable to the nonmoving party, plaintiff's pleadings indicate that he did not act in reliance on the alleged misrepresentations. Plaintiff's amended complaint states:

17. Plaintiff, as a result of Defendant's Acts as set forth herein above instituted a civil action as against his insurer Auto Owners Insurance Company for recovery of the benefits due and owing him as a result of the fire [sic] loss to his home located at 2215 Chippewa, Flint, Michigan.

18. That Plaintiff had to enlist the services of Attorney Douglas M. Philpott to process said suit in the Genesee County Circuit Court, which concluded by a case evaluation award.

Plaintiff's pleadings indicate that he did not act in reliance on defendant's alleged misrepresentations, but rather rejected defendant's alleged misrepresentations, filed suit against Auto Owners Insurance Company to recover benefits, and accepted the case evaluation award.

It is possible that Count I of the complaint was based on negligent misrepresentation. To establish a claim of negligent misrepresentation, a plaintiff must prove that he "justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Mable Cleary Trust, supra* at 502, quoting *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 30; 436 NW2d 70 (1989). Even assuming, without deciding, that the tort of negligent misrepresentation applies to insurance adjusters, we hold that plaintiff failed to state a claim for negligent misrepresentation because plaintiff failed to allege that he "justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Mable Cleary Trust, supra* at 502. Indeed, as discussed above, plaintiff's pleadings do not sufficiently allege reliance and indicate that plaintiff did *not* justifiably rely to his detriment on the information prepared by defendant. Summary disposition was appropriate.

Although the trial court granted summary disposition on different grounds than those asserted here, the trial court's decision granting summary disposition will be affirmed because the right result was reached. *Pro-Staffers, Inc v Premier Mfg Support Servs*, 252 Mich App 318, 322; 651 NW2d 811 (2002).

Plaintiff next argues that the trial court erred in dismissing his claim based on MCL 445.911, a provision of the Michigan Uniform Consumer Protection Act (MCPA), MCL 445.901 *et seq.* We disagree.

Even assuming that 2000 PA 432 – which removed the ability of a plaintiff to bring a private cause of action under MCL 445.911 for misconduct made unlawful by Chapter 20 of the Insurance Code – should not be applied retroactively to bar plaintiff's claim, the claim nonetheless fails. Indeed, MCL 445.911(2) states that "[e]xcept in a class action, a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages or \$250.00, whichever is greater, together with reasonable attorneys' fees" (emphasis added). The

pleadings in this case simply do not adequately allege a loss on the part of plaintiff that resulted from defendant's conduct. The complaint, in fact, indicates that plaintiff *refused to accept* the information set forth (in an allegedly unfair, deceptive, or unconscionable manner) by defendants and eventually accepted a case evaluation award in the lawsuit against Auto Owners Insurance Company. Under the circumstances, we conclude that plaintiff failed to establish a valid MCPA claim. We therefore affirm the trial court's grant of summary disposition, albeit on alternative grounds. *Pro-Staffers, supra* at 322.

Given our disposition of this case, we need not address the additional argument raised by plaintiff on appeal.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello